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9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE DISTRICT OF OREGON

11 ESTATE OF WILLARD SWORDEN, BY )  
12 AND THROUGH PERSONAL REPRESENTATIVE, SCOTT SWORDEN, AND )  
13 SCOTT SWORDEN INDIVIDUALLY, )

No. CV-04-1048-HU

14 Plaintiffs, )

15 v. )

16 REYNOLDS METALS COMPANY, a )  
17 Delaware corporation, ALCOA )  
18 INC., a Pennsylvania corporation, and ESIS, a Pennsylvania corporation, )

OPINION & ORDER

19 Defendants. )  
\_\_\_\_\_ )

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/ / /

1 - OPINION & ORDER

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4 Attorney for Defendant ESIS

5 HUBEL, Magistrate Judge:

6 Plaintiffs Estate of Willard Sworden, by and through Personal  
7 Representative Scott Sworden ("the Estate"), and Scott Sworden  
8 individually, bring this tort action against defendants Reynolds  
9 Metals Company, Alcoa, Inc., and ESIS. Plaintiffs bring claims of  
10 fraud, deceit, breach of fiduciary duty, statutory wrongful death,  
11 common law wrongful death, and a claim under Oregon's Employer  
12 Liability Law.<sup>1</sup>

13 All defendants move for summary judgment on the limited issue  
14 of workers' compensation exclusivity. All parties have consented  
15 to entry of final judgment by a Magistrate Judge in accordance with  
16 Federal Rule of Civil Procedure 73 and 28 U.S.C. § 636(c). I grant  
17 the motions.

18 BACKGROUND

19 Willard Sworden worked at the Reynolds Metals plant in  
20 Troutdale from September 1974 to September 2000. Defendant Alcoa  
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22 <sup>1</sup> The caption of the Complaint suggests that plaintiffs  
23 bring a separate claim of civil conspiracy, but there is no such  
24 claim actually delineated in the body of the Complaint. This is  
25 in accord with Oregon law which does not recognize civil  
26 conspiracy as an independent tort. Stringer v. Car Data Sys.,  
27 Inc., 108 Or. App. 523, 528, 816 P.2d 677, 680 (1991), aff'd, 314  
28 Or. 576, 841 P.2d 1183 (1992). Rather, it is a "theory of mutual  
agency under which the acts of each of the conspirators are  
imputed to the other members for purposes of tort liability."  
Granewich v. Harding, 150 Or. App. 34, 39, 945 P.2d 1067, 1070  
(1997), rev'd in part on other grounds, 329 Or. 47, 57, 985 P.2d  
788, 794 (1999).

1 bought the Troutdale Reynolds plant on May 3, 2000. The purchase  
2 was in the form of a merger between Reynolds and a wholly-owned  
3 subsidiary of Alcoa named RLM Acquisition Corporation. The  
4 surviving entity of that merger is Reynolds Metals Company, a  
5 wholly-owned subsidiary of Alcoa. From the time of purchase on May  
6 3, 2000, until the Troutdale plant shut down permanently in the  
7 fall of 2000, Reynolds continued to operate the plant.

8 On or about November 6, 2000, Willard Sworden was diagnosed  
9 with bladder cancer. On or about March 5, 2001, Willard Sworden  
10 filed a workers' compensation claim for bladder cancer allegedly  
11 arising out of his employment at the Troutdale plant, specifically  
12 his exposure to coal tar pitch. The initial workers' compensation  
13 claim was filed with "Reynolds Metal Co." listed as the employer.  
14 Exh. A to Nov. 17, 2004 Van Valkenberg Affid.

15 On April 24, 2001, ESIS, the third-party administrator for the  
16 claim, denied Willard Sworden's claim on the basis of insufficient  
17 evidence that his employment was the "major contributing cause" of  
18 his claimed condition. The denial letter identifies the  
19 "Client/Account" as "Reynolds Metals." Exh. B to Nov. 17, 2004 Van  
20 Valkenberg Affid. The letter also states that . . . there is  
21 insufficient medical evidence that your employment with Reynolds  
22 Metals is the major contributing cause of your claimed condition,  
23 bladder cancer." Id.

24 On June 19, 2001, Willard Sworden appealed the claim denial,  
25 challenging the denial of the compensability of the claim and  
26 asserting that the claim should have been accepted. In the Request  
27 for Hearing, the employer is identified as "Reynolds Metals." Exh.  
28 C to Nov. 17, 2004 Van Valkenberg Affid.

1 A hearing on certain discovery issues involved in the appeal  
2 was conducted on September 18, 2001, by Administrative Law Judge  
3 (ALJ) Darren Otto. At the hearing, Willard Sworden contended that  
4 the major contributing cause of his cancer was workplace exposure  
5 to coal tar pitch. ALJ Otto continued the hearing to allow the  
6 parties to engage in discovery.

7 During the hearing, an issue was raised regarding whether  
8 Willard Sworden had to file a separate claim against Alcoa.  
9 Excerpts from that hearing show that the parties to the workers'  
10 compensation proceeding agreed to treat the claim against Reynolds  
11 as a claim against Alcoa and the April 24, 2001 denial of the claim  
12 as having come from both entities, obviating the need for Willard  
13 Sworden to file a separate claim against Alcoa. Exh. A to Mar. 7,  
14 2005 Frost Affid. at pp. 2-4; Exh. 8 to Apr. 1, 2005 Karman Declr.

15 Discovery in the claim was in progress when Willard Sworden  
16 died of bladder cancer on May 27, 2002.

17 In August 2002, Evohl Malagon, an attorney representing Linda  
18 Cato, a woman claiming to be Willard Sworden's common-law wife,  
19 made a claim for widow's benefits. ESIS questioned Cato's right to  
20 receive widow's benefits. Cato's claim was joined in the same  
21 proceeding as Willard Sworden's appeal of the denial of his claim.

22 On November 26, 2002, ESIS issued a Notice of Acceptance of  
23 Willard Sworden's workers' compensation claim.

24 On January 13, 2003, ESIS paid \$18,288.76 to Kaiser Permanente  
25 for Willard Sworden's medical costs and also issued a check to Cato  
26 for \$4,825 for reimbursement of Willard Sworden's funeral expenses.

27 On January 20, 2003, plaintiffs' counsel Peter Hansen filed a  
28 "Supplemental Request for Hearing," on behalf of the Estate, asking

1 that the November 2002 acceptance of Willard Sworden's claim be set  
2 aside. Cato did not join in this request.

3 On February 27, 2003, ALJ Otto dismissed the Estate from the  
4 workers' compensation proceeding because the estate of a deceased  
5 worker is not entitled to pursue a claim in the event the claimant  
6 dies before the final disposition of the claimant's hearing  
7 request. ALJ Otto also concluded that Cato was not entitled to  
8 widow's benefits because she did not have a living child under the  
9 age of eighteen as a result of her relationship with Willard  
10 Sworden.

11 The Workers' Compensation Board upheld the ALJ's rulings.  
12 Both the Estate and Cato have appealed the Board's rulings to the  
13 Oregon Court of Appeals. The appeals are pending. Plaintiff  
14 initiated the action in this Court on July 30, 2004.

#### 15 STANDARDS

16 Summary judgment is appropriate if there is no genuine issue  
17 of material fact and the moving party is entitled to judgment as a  
18 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the  
19 initial responsibility of informing the court of the basis of its  
20 motion, and identifying those portions of "'pleadings, depositions,  
21 answers to interrogatories, and admissions on file, together with  
22 the affidavits, if any,' which it believes demonstrate the absence  
23 of a genuine issue of material fact." Celotex Corp. v. Catrett,  
24 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

25 "If the moving party meets its initial burden of showing 'the  
26 absence of a material and triable issue of fact,' 'the burden then  
27 moves to the opposing party, who must present significant probative  
28 evidence tending to support its claim or defense.'" Intel Corp. v.

1 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)  
2 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th  
3 Cir. 1987)). The nonmoving party must go beyond the pleadings and  
4 designate facts showing an issue for trial. Celotex, 477 U.S. at  
5 322-23.

6 The substantive law governing a claim determines whether a  
7 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors  
8 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as  
9 to the existence of a genuine issue of fact must be resolved  
10 against the moving party. Matsushita Elec. Indus. Co. v. Zenith  
11 Radio, 475 U.S. 574, 587 (1986). The court should view inferences  
12 drawn from the facts in the light most favorable to the nonmoving  
13 party. T.W. Elec. Serv., 809 F.2d at 630-31.

14 If the factual context makes the nonmoving party's claim as to  
15 the existence of a material issue of fact implausible, that party  
16 must come forward with more persuasive evidence to support his  
17 claim than would otherwise be necessary. Id.; In re Agricultural  
18 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);  
19 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,  
20 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

#### 21 DISCUSSION

22 The backdrop for this case is a 2001 Oregon Supreme Court case  
23 involving the constitutionality of the workers' compensation  
24 exclusivity provision as it applies to denials of occupational  
25 disease claims. In Smothers v. Gresham Transfer, Inc., 332 Or. 83,  
26 23 P.3d 333 (2001), the plaintiff filed a workers' compensation  
27 claim for a lung condition that he contended was caused by his  
28 exposure at the workplace to certain chemicals used in a trucking

1 company's truck washing service. The defendant's insurer denied  
2 the claim. At a hearing before an ALJ, the issue was whether the  
3 plaintiff had a compensable occupational disease. The ALJ upheld  
4 the insurer's denial because, the ALJ concluded, the plaintiff had  
5 failed to prove that his work exposure was the major contributing  
6 cause of his lung disorder. Thereafter, the Workers' Compensation  
7 Board affirmed the ALJ's decision. The Oregon Court of Appeals  
8 affirmed the Board without opinion.

9 The plaintiff then filed a civil negligence action against the  
10 employer. The trial court dismissed the complaint for failure to  
11 state a claim, reasoning that Oregon Revised Statute § (O.R.S.)  
12 656.018 made workers' compensation law the exclusive remedy for  
13 work-related injuries, whether or not a claim is compensable. The  
14 Oregon Court of Appeals affirmed. The plaintiff appealed to the  
15 Oregon Supreme Court, arguing that he had been denied a remedy for  
16 the injuries that he suffered at work in violation of the remedy  
17 clause in Article I, section 10 of the Oregon Constitution.

18 On appeal, the plaintiff argued that while he could not prove  
19 that the acid fumes and mist to which he was subjected at his  
20 workplace were "the major contributing cause" of his lung  
21 condition, he nonetheless had been injured at work, the fumes and  
22 mist were a cause of that injury, and that the amendments to O.R.S.  
23 656.018, making the compensation statutes his exclusive remedy  
24 regardless of the compensability of the claim, left him with no  
25 remedy for the injuries he had suffered at work in violation of  
26 Article I, section 10's remedy clause.

27 The lengthy Supreme Court opinion starts by tracing the  
28 history of remedy clauses in state constitutions and then proceeds

1 to examine Oregon's remedy clause and prior Oregon Supreme Court  
2 cases interpreting the clause. In setting forth the appropriate  
3 analysis for remedy clause claims in general, the court stated:

4       It follows from the foregoing that, in analyzing a  
5 claim under the remedy clause, the first question is  
6 whether the plaintiff has alleged an injury to one of the  
7 absolute rights that Article I, section 10 protects.  
8 Stated differently, when the drafters wrote the Oregon  
9 Constitution in 1857, did the common law of Oregon  
10 recognize a cause of action for the alleged injury? If  
11 the answer to that question is yes, and if the  
12 legislature has abolished the common-law cause of action  
13 for injury to rights that are protected by the remedy  
14 clause, then the second question is whether it has  
15 provided a constitutionally adequate substitute remedy  
16 for the common-law cause of action for that injury.

17 Id. at 124; 23 P.3d at 356-57.

18       The court then turned to the analysis of the facts in  
19 Smothers. The court stated that its first task was to determine  
20 whether the plaintiff had alleged an injury to one of the rights  
21 for which the remedy clause mandates that a remedy be available by  
22 due course of law. Id. at 128; 23 P.3d at 359. The court  
23 concluded that "in 1857, the common law of Oregon would have  
24 recognized that a worker had a cause of action for negligence  
25 against his employer for failing to provide a safe workplace and  
26 failing to warn of the dangerous conditions to which the worker  
27 would be exposed at work." Id. at 131; 23 P.3d at 360. T h e  
28 next question was whether there was a remedial process available to  
the plaintiff for seeking redress for the injuries that he alleges  
that he suffered. Id. The court noted that the "major  
contributing cause" standard used in Oregon workers' compensation  
claims for occupational diseases, did not exist at common law. Id.  
at 134; 23 P.3d at 361.

Thus, for those workers' compensation claims that are



1 subject to the major contributing cause standard, [i.e.  
2 occupational diseases], workers' compensation law does  
3 not provide compensation for a work-related incident that  
4 was only a contributing cause of the worker's injury.  
5 Therefore, workers' compensation law no longer provides  
a remedy for some wrongs or harms occurring in the  
workplace for which a common-law negligence cause of  
action had existed when the drafters wrote the Oregon  
Constitution in 1857.

6 Id.

7 In summarizing its holding, the court stated:

8 Based on our analysis of the remedy clause of  
9 Article I, section 10, we conclude that determining  
10 whether the exclusive remedy provisions of ORS 656.018  
11 (1995) violate that clause involves a case-by-case  
12 analysis. The first inquiry is whether a workers'  
13 compensation claim alleges an injury to an "absolute"  
14 common-law right that the remedy clause protects. If it  
15 does, and the claim is accepted and the worker receives  
16 the benefits provided by the workers' compensation  
17 statutes, then the worker cannot complain that he or she  
18 has been deprived of a remedial process for seeking  
19 redress for injury to a right that the remedy clause  
20 protects. Neither can the worker complain that he or she  
21 has been deprived of a remedial process if a compensation  
22 claim is denied because the worker is unable to prove  
that the work-related incident was a contributing cause  
of the alleged injury, which is what a plaintiff would  
have had to prove in a common-law cause of action for  
negligence. However, if a workers' compensation claim  
for an alleged injury to a right that is protected by the  
remedy clause is denied because the worker has failed to  
prove that the work-related incident was the major,  
rather than merely a contributing, cause of the injury,  
then the exclusive remedy provisions of ORS 656.018  
(1995) are unconstitutional under the remedy clause,  
because they leave the worker with no process through  
which to seek redress for an injury for which a cause of  
action existed at common law.

23 Id. at 135; 23 P.3d at 362.

24 Following Smothers, the Oregon Legislature adopted O.R.S.  
25 656.019(1) (a) which codifies Smothers. The statute provides that

26 [a]n injured worker may pursue a civil negligence action  
27 for a work-related injury that has been determined to be  
28 not compensable because the worker has failed to  
establish that a work-related incident was the major  
contributing cause of the worker's injury only after an  
order determining that the claim is not compensable has

1        become final.     The injured worker may appeal the  
2        compensability of the claim as provided in ORS 656.298,  
3        but may not pursue a civil negligence claim against the  
4        employer until the order affirming the denial has become  
5        final.

6     O.R.S. 656.019(1)(a).

7        To come within the exception to the workers' compensation  
8        exclusive remedy provision articulated in Smothers, and thus, to be  
9        able to proceed with tort claims typically precluded by that  
10       exclusivity remedy provision, a plaintiff must show that he or she  
11       has been denied the statutory remedy which the Legislature has  
12       substituted for the common law remedy and that such denial violates  
13       the claimant's constitutional rights under the Oregon Constitution.  
14       Here, plaintiffs first argue that the November 2002 acceptance of  
15       Willard Sworden's workers' compensation claim following its initial  
16       denial was wrongful and should be set aside.     Following that,  
17       plaintiffs contend that a denial of the statutory remedy in Willard  
18       Sworden's case violates Oregon's remedy clause.

19       I do not discuss plaintiffs' arguments regarding the propriety  
20       of the acceptance of the compensation claim.     I conclude that even  
21       if the acceptance were somehow wrongful and even if Willard  
22       Sworden's claim should have been denied, and assuming that  
23       plaintiffs could obtain a final order of denial of the claim,  
24       plaintiffs still cannot proceed with the claims asserted here  
25       because the claims were not recognized at common law in 1857 and  
26       thus, the remedy clause does not guarantee a civil action remedy  
27       for such claims.     Plaintiffs do not bring a claim for negligently  
28       inflicted injury by the employer as in Smothers.

29     / / /

30     / / /

1 I. General Principles of Workers' Compensation Exclusivity  
2 and Its Application to the Claims and Parties in this  
3 Case

4 A. General Principles

5 O.R.S. 656.018 provides, in pertinent part:

6 (1)(a) The liability of every employer who satisfies the  
7 duty required by ORS 656.017(1) is exclusive and in place  
8 of all other liability arising out of injuries, diseases,  
9 symptom complexes or similar conditions arising out of  
10 and in the course of employment that are sustained by  
11 subject workers, the workers' beneficiaries and anyone  
12 otherwise entitled to recover damages from the employer  
13 on account of such conditions or claims resulting  
14 therefrom, specifically including claims for contribution  
15 or indemnity asserted by third persons from whom damages  
16 are sought on account of such conditions, except as  
17 specifically provided otherwise in this chapter.

18 . . . .

19 (2) The rights given to a subject worker and the  
20 beneficiaries of the subject worker under this chapter  
21 for injuries, disease, symptom complexes or similar  
22 conditions arising out of and in the course of employment  
23 are in lieu of any remedies they might otherwise have for  
24 such injuries, diseases, symptom complexes or similar  
25 conditions against the worker's employer under ORS  
26 654.305 to 654.336 or other laws, common law or statute,  
27 except to the extent the worker is expressly given the  
28 right under this chapter to bring suit against the  
employer of the worker for an injury, disease, symptom  
complex or similar condition.

(3) The exemption from liability given an employer under  
this section is also extended to the employer's insurer  
[.] . . .

. . . .

(7) The exclusive remedy provisions and limitation on  
liability provisions of this chapter apply to all  
injuries and to diseases, symptom complexes or similar  
conditions of subject workers arising out of and in the  
course of employment whether or not they are determined  
to be compensable under this chapter.

O.R.S. 656.018.

Generally, "[w]hen the Workers' Compensation Law provides the  
basis for a compensable injury claim, then that remedy is exclusive

1 and the worker cannot seek a tort remedy instead." Panpat v.  
2 Owens-Brockway Glass Container, Inc., 334 Or. 342, 348, 49 P.3d  
3 773, 776 (2002). "Conversely, if the injury did not arise out of  
4 and in the course of employment, then the exclusivity provision of  
5 the Workers' Compensation Law is not a bar to a civil action  
6 against an employer for personal injuries." Id.

7         Workers who are injured in the course and scope of  
8 employment are entitled to receive certain benefits from  
9 their employers, and, with some notable exceptions, those  
10 benefits are exclusive of all other remedies that would  
11 otherwise be available to the worker. . . . The workers'  
12 compensation scheme involves a quid pro quo, in which the  
13 employer gives up the right to defend against certain  
actions involving workplace injuries, while receiving the  
benefit of a limit on potential damages. Conversely, the  
employee is compensated for injuries regardless of  
whether the employer would be liable in tort, while  
giving up the right to pursue other statutory or common-  
law remedies.

14 Hanson v. Versarail Sys, Inc., 175 Or. App. 92, 95-96, 28 P.3d 626,  
15 627 (2001) (citations omitted).

16         The exclusivity provision applies regardless of whether the  
17 injury is ultimately compensable. O.R.S. 656.018(7); Smothers, 332  
18 Or. at 88, 23 P.3d at 337 (noting legislative amendment to provide  
19 that workers' compensation is the exclusive remedy for work-related  
20 injuries, even if a claim is not compensable).

## 21         B. Parties

22         Under the plain statutory language, employers and workers'  
23 compensation insurance carriers are protected by the exclusivity  
24 provision. Thus, all defendants may rely on the provision.<sup>2</sup>

25         Exclusivity expressly applies to "workers' beneficiaries and  
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27         <sup>2</sup> Plaintiffs' separate argument regarding whether Alcoa is  
28 an employer is addressed below.

1 anyone else otherwise entitled to recover damages from the employer  
2 on account of such conditions or claims resulting therefrom."  
3 O.R.S. 656.018(1)(a). Moreover, Oregon courts have applied the  
4 exclusive remedy provision to bar claims brought by the family and  
5 the estate of an injured worker. See Kilminster v. Day Mgmt Corp.,  
6 323 Or. 618, 623-28, 919 P.2d 474, 477-79 (1996) (exclusivity  
7 provision applied to bar estate of decedent worker from pursuing  
8 statutory negligent wrongful death claim because decedent would  
9 have had no claim and statute only conferred derivative rights);  
10 Rangel v. Denton Plastics, Inc., 148 Or. App. 328, 335, 939 P.2d  
11 644, 647 (1997) (after determining that the plaintiffs could not  
12 sustain their claim that the employer deliberately intended to  
13 injure the employee, court affirmed trial court's holding that  
14 exclusivity provision barred claims brought by decedent's parents  
15 and his estate).

16 The exclusivity provision applies as well even when the  
17 specific plaintiff in the civil action receives no benefits or  
18 recovery under the workers' compensation system as a result of the  
19 worker's death. In Leech v. Georgia-Pacific Corp., 259 Or. 161,  
20 485 P.2d 1195 (1971), the disabled daughter of a deceased worker  
21 brought an action against her father's employer for damages  
22 resulting from the father's death in an industrial accident. As an  
23 adult child of the deceased worker, the daughter did not qualify,  
24 under the workers' compensation statutes in effect at that time, to  
25 receive any workers' compensation benefits directly.<sup>3</sup>

26 The daughter sued for negligence in a civil action. In  
27

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28 <sup>3</sup> The statute has since been amended.

1 response to the defendant's workers' compensation exclusivity  
2 argument, the daughter argued that the exclusivity provision should  
3 not apply to her because no statutory workers' compensation  
4 benefits were provided on her account. She contended that a  
5 dependent who receives no compensation benefits should not be  
6 barred from bringing a negligence action.

7 The Supreme Court disagreed. It first noted that the plain  
8 language of the statute "indicates . . . that the legislature  
9 intended the remedy provided by [workers'] compensation to be  
10 exclusive and that complying employers are not subject to  
11 negligence actions by persons omitted from the compensation benefit  
12 schedules." 259 Or. at 166, 485 P.2d at 1197.

13 Second, the court upheld the constitutionality of the  
14 exclusivity provision in the face of the plaintiff's equal  
15 protection/"palpably arbitrary" argument. Id. at 167-70, 485 P.2d  
16 at 1198-99. The court noted that the "legislature is not  
17 constitutionally required to enact laws which operate to solve  
18 perfectly every aspect of the problem to which they are directed."  
19 Id. at 167, 485 P.2d at 1198. The legislature's decision to  
20 provide workers' compensation benefits to certain classes of  
21 people, and not to others who may have been dependent on the  
22 worker, did not render the exclusivity provision unconstitutional.  
23 Id. at 168-67, 485 P.2d at 1198-99.<sup>4</sup>

24 Defendants may properly assert the exclusivity provision and,  
25

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26 <sup>4</sup> The court expressly declined to address the argument that  
27 the exclusivity provision as applied to the plaintiff in that  
28 case violated Article I, section 10's remedy provision. 259 Or.  
at 167 n.3; 485 P.3d at 1198 n.3.

1 subject to plaintiffs' constitutional argument discussed below, the  
2 exclusivity provision applies to both the Estate and to Scott  
3 Sworden to bar them from pursuing the civil tort claims in this  
4 case.

### 5 C. Claims

6 As noted above, the claims asserted in this case are statutory  
7 wrongful death, common law wrongful death, breach of fiduciary  
8 duty, fraud, and a claim under the statutory Employer's Liability  
9 Law (ELL) .

10 Both wrongful death claims and the ELL claim are asserted  
11 against Reynolds and Alcoa<sup>5</sup>. The allegations in support of these  
12 claims at paragraphs 1-6, 17-25 of the Complaint, make clear that  
13 these claims are exactly the types of claims to which the  
14 exclusivity of the workers' compensation system applies.  
15 Plaintiffs contend that these causes of action arise out of Willard  
16 Sworden's alleged workplace exposure to coal tar pitch which led to  
17 his bladder cancer and eventual death. Thus, they are barred by  
18 O.R.S. 656.018(1)(a) .

19 Defendants argue that the exclusivity provision applies to the  
20 other claims as well because they concern the handling of a claim.  
21 Defendants correctly note that the "arising out of" language  
22 extends to the alleged failure to "provide adequate compensation."  
23

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24 <sup>5</sup> The ELL and statutory wrongful death claims are expressly  
25 asserted against only Reynolds and Alcoa. The common law  
26 wrongful death claim is not so limited, but it incorporates the  
27 allegations made in support of the ELL and statutory wrongful  
28 death claims asserted against only those two defendants.  
Moreover, the nature of the claim indicates that as with the  
statutory wrongful death and the ELL claims, it can be asserted  
only against the employer, not the insurance carrier ESIS.

1 Nicholson v. Blachly, 86 Or. App. 645, 649, 740 P.2d 220, 222,  
2 rev'd on other grounds, 305 Or. 578, 753 P.2d 955 (1988).

3 Two other cases are relevant to the issue of whether the fraud  
4 and breach of fiduciary duty claims are barred by the exclusivity  
5 provision. First, in Gordineer v. Bellotti, 100 Or. App. 102, 785  
6 P.2d 362 (1990), the plaintiff alleged that his employer had  
7 furnished false and perjured testimony and evidence in a workers'  
8 compensation hearing at which an overpayment claim was at issue and  
9 that, as a result, he suffered a loss of temporary total disability  
10 benefits to which he alleged that he was entitled.

11 The court rejected the plaintiff's argument that the wrongs  
12 alleged in his action did not arise out of his compensable injury  
13 but, rather, were post-injury intentional torts for which he could  
14 bring a civil action. Id. at 105, 785 P.2d at 363. Rather, the  
15 court explained, plaintiff stated the issue "too narrowly." The  
16 question "is not whether the wrongs arose out of his compensable  
17 injury or were post-injury, but whether they were matters  
18 'concerning a claim,' for which the decision and review provisions  
19 of workers' compensation law are exclusive." Id. at 105-06, 785  
20 P.2d at 363-64.

21 Given the plaintiff's allegations, the court concluded that  
22 the plaintiff alleged "damages that arose directly out of a  
23 workers' compensation proceeding in which the amount of  
24 compensation was in issue." Id. at 106, 785 P.2d at 364. The  
25 court further noted that adding a claim

26 for general and punitive damages in addition to a claim  
27 for loss of compensation does not alter the nature of his  
28 cause of action. He seeks to overturn a workers'  
compensation decision, and the trial court was correct in  
holding that the remedies in the workers' compensation



1 law are exclusive.

2 Id. at 106-07, 785 P.2d at 364.

3 The Gordineer court distinguished the other relevant case,  
4 Crosby v. SAIF, 73 Or. App. 372, 699 P.2d 198 (1985). There, the  
5 plaintiff alleged that the defendants had conspired to divest him  
6 unlawfully of his right to workers' compensation benefits and to  
7 terminate him unlawfully. Specifically, the plaintiff alleged that  
8 after his on-the-job injury, his employer and SAIF, the employer's  
9 workers' compensation insurer, met and agreed that (1) the employer  
10 would create a light duty job for the plaintiff so that workers'  
11 compensation benefits would no longer be payable to the plaintiff,  
12 and (2) that after the plaintiff started his employment in the  
13 light duty position, he would be discharged from his employment.  
14 Id. at 373, 699 P.2d at 199. The plaintiff brought three claims:  
15 civil conspiracy, intentional interference with contract against  
16 SAIF, and intentional infliction of emotional distress.

17 The trial court dismissed the claims against the employer on  
18 the basis that the plaintiff's sole remedy was under O.R.S. Chapter  
19 659, the discrimination laws. The Court of Appeals reversed. The  
20 appellate court first noted that under Holien v. Sears, Roebuck &  
21 Co., 298 Or. 76, 689 P.2d 1292 (1984), the plaintiff was not  
22 precluded from bringing a common law tort claim because of the  
23 existence of remedies under O.R.S. Chapter 659. Id. at 374, 699  
24 P.2d at 200.

25 Next, the court rejected the argument that plaintiff's claim  
26 was limited to one for unlawful termination for having filed a  
27 workers' compensation claim under O.R.S. 659.410. Rather, the  
28 court explained, the plaintiff did not plead that he was terminated

1 because he filed a claim. He alleged that defendants conspired to  
2 divest him unlawfully of his right to workers' compensation  
3 benefits and to terminate him. Id. at 375, 699 P.2d at 200.

4 As the Gordineer court noted, there was no issue in Crosby  
5 about the exclusivity of the workers' compensation law. Gordineer,  
6 100 Or. App. at 106, 785 P.2d at 364. The Gordineer court  
7 explained that "SAIF's contention (which we rejected) was that,  
8 because the plaintiff's allegations arose out of his termination  
9 after he had filed a workers' compensation claim, the remedies for  
10 discrimination under ORS chapter 659 were exclusive. More  
11 fundamentally, the misconduct alleged in Crosby had nothing to do  
12 with the disposition of the plaintiff's compensation claim." Id.

13 Here, the relevant allegations in the Complaint are that  
14 defendants or their agents developed a scheme which would deny  
15 damages or compensation for Willard Sworden's bladder cancer and  
16 eventual death to Willard Sworden's decedent and his estate.  
17 Compl. at ¶ 10. Under this alleged scheme to deny Willard Sworden  
18 workers' compensation benefits and then to deny his estate the  
19 right to bring a civil action for damages, defendant ESIS accepted  
20 Willard Sworden's compensation claim after he died. Id. The  
21 entering of the notice of claim acceptance was allegedly done for  
22 the unlawful purpose of denying Willard Sworden and plaintiffs an  
23 adequate remedy for his death from bladder cancer. Id. Defendants  
24 have allegedly intentionally and knowingly entered a false notice  
25 of claim acceptance to the Estate misrepresenting the Estate's  
26 entitlement to workers' compensation benefits under the law and  
27 intending that the Estate and the Workers' Compensation Board would  
28 rely upon that misrepresentation. Id. at ¶ 15.

1       Based on these allegations, I agree with defendants that the  
2 fraud and breach of fiduciary duty claims concern the processing of  
3 Willard Sworden's workers' compensation claim because the tort  
4 claims are based on the allegation that the acceptance of the claim  
5 after his death was wrongful. This is a direct challenge to the  
6 processing of the claim. Thus, I agree with defendants that under  
7 Gordineer, the claims are subject to the exclusivity provision.

8       Plaintiffs argue that the court should rely on Crosby and the  
9 exception to workers' compensation exclusivity for intentional  
10 acts. I reject plaintiffs' reliance on Crosby. This case is  
11 controlled by Gordineer, not Crosby.

12       In Crosby, there was no question that the plaintiff was  
13 entitled to workers' compensation for his injury. The tort claims  
14 asserted in the civil action did not relate to the handling of the  
15 claim but rather, to the post-claim alleged agreement between the  
16 defendants to allegedly deprive the plaintiff of his compensation  
17 by means other than processing the claim. Here, in contrast, the  
18 basis of plaintiffs' fraud and breach of fiduciary duty claims is  
19 that defendants initially conspired to wrongfully deny Willard  
20 Sworden's claim while he was alive and then conspired to wrongfully  
21 accept the claim after he died. The only way to characterize these  
22 claims is that they have everything to do with the disposition of  
23 Willard Sworden's workers' compensation claim. Crosby is not  
24 controlling.

25       Next, O.R.S. 656.156(2) creates an exception to the  
26 exclusivity provision for certain intentional acts by the employer:

27       If injury or death results to a worker from the  
28       deliberate intention of the employer of the worker to  
      produce such injury or death, the worker, the widow,

1 widower, child or dependent of the worker may take under  
2 this chapter, and also have cause for action against the  
3 employer, as if such statutes had not been passed, for  
4 damages over the amount payable under those statutes.

5 O.R.S. 656.156(2).

6 Plaintiffs overstate the exemption from the exclusivity  
7 provision. It does not apply to all "intentional torts," but only  
8 to those injuries or deaths resulting from the deliberate intent to  
9 cause the injury or death. See Kilminster, 323 Or. at 631, 919  
10 P.2d at 481 ("deliberate intent" requires the worker to show that  
11 the employer had the specific intent to injure the employee); see  
12 also Hanson, 175 Or. App. at 97-100, 28 P.3d at 628-30 (plaintiff  
13 could not rely on doctrine of respondeat superior to bring a  
14 battery claim against the employer under O.R.S. 656.156(2) because  
15 the employer did not intend to injure the plaintiff).

16 In this case, the fraud and breach of fiduciary duty claims do  
17 not allege that defendants intentionally caused Willard Sworden's  
18 bladder cancer and death. Rather, the allegations of intentional  
19 conduct relate to the processing of Willard Sworden's workers'  
20 compensation claim. This is the same type of allegation that the  
21 court in Gordineer held was covered by the exclusivity provision  
22 where the court rejected the plaintiff's argument that his post-  
23 injury intentional tort claims regarding the employer's alleged  
24 false and perjured testimony were "intentional torts" for which he  
25 could bring a civil action. Rather, as discussed above, because  
26 the civil claims were matters concerning the handling of the  
27 workers' compensation claim, O.R.S. 656.018 applied.

28 The workers' compensation exclusivity provision in O.R.S.

1 656.018 applies to all of the claims asserted in this case.<sup>6</sup>

2 II. Oregon Constitution - Remedies Provision

3 Article I of the Oregon Constitution is Oregon's Bill of  
4 Rights. Smothers, 332 Or. at 91, 23 P.3d at 338. Section 10  
5 provides:

6 No court shall be secret, but justice shall be  
7 administered, openly and without purchase, completely and  
8 without delay, and every man shall have remedy by due  
course of law for injury done him in his person,  
property, or reputation.

9 Or. Const. Art. I, sec. 10.

10 As explained in Smothers, the phrase "every man" means every  
11 person and

12 [u]nlike many provisions in bills of rights, which  
13 protect individual rights by prohibiting the legislature  
14 from enacting certain laws or prohibiting the government  
15 from taking certain actions, the second clause of section  
10 protects rights respecting person, property, and  
16 reputation by mandating affirmatively that remedy by due  
course of law be available in the event of injury to  
those rights.

17 Smothers, 332 Or. at 92, 23 P.3d at 339.

18 As explained earlier in this Opinion, Smothers sets forth the  
19 following remedy clause analysis:

20 in analyzing a claim under the remedy clause, the first  
21 question is whether the plaintiff has alleged an injury

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22 <sup>6</sup> Interestingly, even plaintiffs seem to recognize the  
23 validity of this conclusion. Defendants note that in the pending  
24 appeals before the Oregon Court of Appeals by petitioners Cato  
25 and the Estate, the petitioners argue that "[w]hether the  
26 employer inappropriately accepted the claim is an issue regarding  
27 a right to receive compensation . . . [and is] squarely [a]  
28 matter[] concerning a claim." Exh. 1 to Apr. 1, 2005 Karman  
Declr. at p. 4. The petitioners further assert that the  
"workers' compensation forum is the only place to litigate  
'matters concerning a claim[]' [and] that the Hearings Division  
is the only forum for the estate's claims of employer  
impropriety." Id. at pp. 4-5.

1 to one of the absolute rights that Article I, section 10  
2 protects. Stated differently, when the drafters wrote  
3 the Oregon Constitution in 1857, did the common law of  
4 Oregon recognize a cause of action for the alleged  
5 injury? If the answer to that question is yes, and if  
6 the legislature has abolished the common-law cause of  
7 action for injury to rights that are protected by the  
8 remedy clause, then the second question is whether it has  
9 provided a constitutionally adequate substitute remedy  
10 for the common-law cause of action for that injury.

11 Id. at 124, 23 P.3d at 356-57.

12 Remedy clause cases after Smothers have adhered to the  
13 Smothers analysis. E.g., Jensen v. Whitlow, 334 Or. 412, 417-18,  
14 51 P.3d 599, 601-02 (2002) (following methodology adopted in  
15 Smothers); Lawson v. Hoke, 190 Or. App. 92, 95-96, 77 P.3d 1160,  
16 1162-63 (2003) (same), rev. allowed, 336 Or. 509, 87 P.3d 1136  
17 (2004). Under Smothers, the first question in the analysis is  
18 whether the common law of Oregon recognized a cause of action for  
19 the alleged injuries in 1857.

20 A. Statutory Causes of Action

21 As explained in Smothers, the remedy clause protects "a wrong  
22 or harm for which a cause of action existed when the drafters wrote  
23 the Oregon Constitution in 1857." Smothers, 332 Or. at 124, 23  
24 P.3d at 356; see also Storm v. McClung, 334 Or. 210, 221-23, 47  
25 P.3d 476, 481-82 (2002) (noting that Smothers made clear that the  
26 purpose of Article I, section 10 was to protect absolute "common  
27 law" rights and to the extent earlier cases had suggested that  
28 Article I, section 10 protected any recognized cause of action  
regardless of whether it existed at common law or was legislatively  
created, those cases were in error).

It is clear that the protection extends only to common law  
causes of action. Thus, plaintiffs' statutory wrongful death and

1 ELL claims, which are based only on Oregon statutes and not Oregon  
2 common law, are not protected by Article I, section 10's guarantee  
3 of a remedy. Accordingly, regardless of whether the acceptance of  
4 the workers' compensation claim was somehow wrongful, even if  
5 plaintiffs had a final order of a denial of that claim, they would  
6 be unable to successfully argue that the exclusivity provision of  
7 the workers' compensation statutes violates their rights under  
8 Article I, section 10.

9 B. Common-law Wrongful Death Claim

10 Plaintiffs contend that as to their common law claim for  
11 wrongful death, I should certify the question of whether Oregon  
12 recognizes such a claim to the Oregon Supreme Court. There are  
13 several problems with this request.

14 First, as defendants note, certification of questions from a  
15 federal court to the Oregon Supreme Court is governed by O.R.S.  
16 28.200 - O.R.S. 28.255. A federal court may certify a question

17 if there are involved in any proceedings before it  
18 questions of law of this state which may be determinative  
19 of the cause then pending in the certifying court and as  
20 to which it appears to the certifying court there is no  
controlling precedent in the decisions of the Supreme  
court and the intermediate appellate courts of this  
state.

21 O.R.S. 28.200.

22 Under this Court's Local Rule 83.15(a), this Court applies the  
23 criteria for certification set forth in Western Helicopter  
24 Services, Inc. v. Rogerson Aircraft Corp., 311 Or. 361, 811 P.2d  
25 627 (1991). The rule requires the party seeking certification is  
26 required to file and serve a motion with a supporting memorandum  
27 that complies with the Western Helicopter case. One of the Western  
28 Helicopter criteria is that "it must appear to the certifying court

1 that there is no controlling precedent in the decisions of [the  
2 Oregon Supreme Court] or the Oregon Court of Appeals." Western  
3 Helicopter, 311 Or. at 365, 811 P.2d at 630.

4 Plaintiffs have not met the procedural criteria set forth in  
5 L.R. 83.15 because they have not filed a motion seeking  
6 certification or analyzing the factors set forth in Western  
7 Helicopter.

8 More importantly, even if plaintiffs had complied with the  
9 procedural prerequisites, I would decline to endorse certification  
10 because there is controlling precedent in the Oregon courts.  
11 Plaintiffs rely on Storm for the proposition that the Oregon  
12 Supreme Court has acknowledged that Oregon may indeed recognize an  
13 action for common law wrongful death, but that the question has not  
14 been answered because it has not been directly presented to the  
15 Oregon Supreme Court. I disagree with plaintiffs.

16 Oregon appellate courts have held on numerous occasions that  
17 there is no action for wrongful death at common law in Oregon and  
18 that wrongful death exists only as a statutory cause of action.  
19 E.g., Smothers, 332 Or. at 128, 23 P.3d at 358 ("Oregon has no  
20 common-law action for wrongful death"); Kilminster, 323 Or. at 627,  
21 929 P.2d at 479 (noting that because Oregon has no common law  
22 action for wrongful death, the plaintiffs suffered no legally  
23 cognizable injury to their person, property, or reputation); Griest  
24 v. Phillips, 322 Or. 281, 294, 906 P.2d 789, 797 (1995) (noting  
25 that the right of action for wrongful death in Oregon is statutory  
26 and "at common law no remedy by way of a civil action for wrongful  
27 death existed[.]") (internal quotation omitted).

28 Despite these statements in the multiple Oregon Supreme Court



1 opinions, plaintiffs rely on the following language from Storm to  
2 argue that the existence of a common-law wrongful death claim is  
3 actually undecided in Oregon and thus, provides the basis for  
4 certification of the issue by this court to the Oregon Supreme  
5 Court:

6 Plaintiff's counsel has presented this court with  
7 research that counsel contends establishes that a common-  
8 law action for wrongful death is legally cognizable in  
9 Oregon's courts and that the Oregon courts should have  
acknowledged a common-law action for wrongful death since  
Oregon's statehood. FN4 That question, however, is  
beside the point in this case.

10 FN4 This court previously has been apprised of the  
11 questionable premise underlying the widely held  
12 view that there was no common-law action for  
13 wrongful death. The court acknowledged as much  
14 when it addressed the history of wrongful death  
15 actions in Oregon in Goheen v. General Motors  
16 Corp., 263 Or. 145, 150-51, 502 P.2d 223 (1972).  
In Goheen, the court first pointed out Prosser's  
criticism of Baker v. Bolton, 1 Camp 493, 170 Eng  
Rep 1033 (nisi Prius 1808), the first case to  
declare that no civil right of action damages for  
the death of another could stand:

17 "\* \* \* Lord Ellenborough, whose forte was never  
18 common sense, held without citing any authority  
19 that a husband had no action for loss of his wife's  
services through her death, and declared in broad  
terms that "in a civil court the death of a human  
being could not complained of as an injury."

20 Goheen, 263 Or. at 150-51, 502 P.2d 223.

21 The court then observed:

22 "Meanwhile, the American courts allowed recovery  
23 for wrongful death. In 1848, however, the  
24 Massachusetts Supreme Court in Carey v. Berkshire  
25 R.R. Co. [55 Mass. 475 (1848)], ignored earlier  
26 decisions by American courts to the contrary and  
cited and adopted the rule as stated in Baker v.  
Bolton. Since then most American courts, including  
this court, have adopted the rule holding that  
there is no common law cause of action for wrongful  
death.

27 Id. at 151, 502 P.2d 223 (footnotes omitted).  
28

1 To compensate for the lack of a common-law right of  
2 action for wrongful death, Lord Campbell's Act was  
3 adopted in England, and the states followed suit by  
4 adopting similar statutes. Id. at 153, 502 P.2d  
5 223. The original Oregon Wrongful Death Act was  
included in the original Deady Code of 1862. Since  
at least 1891, this court has adhered to the view  
that no right of action for wrongful death existed  
at common law.

6 334 Or. at 222 & n.4, 47 P.3d at 482 & n.4 (brackets in Storm).

7 This dicta discussion by the Oregon Supreme Court in Storm  
8 shows that the court is well aware of the argument that its years  
9 of holding that there is no common-law cause of action for wrongful  
10 death in Oregon may be unsupportable but that, in fact, the court  
11 has chosen to adhere to that holding. This discussion does not,  
12 contrary to plaintiff's assertion, show that the Oregon Supreme  
13 Court has declined to address the issue because it has not been  
14 directly before the court. While there was no common-law cause of  
15 action at issue in Storm, the court did not suggest that it might  
16 change its holding of more than a century if the question were  
17 "directly presented."

18 During oral argument, plaintiffs noted that at present, there  
19 were cases pending in the Oregon courts raising the issue of the  
20 viability of a common law wrongful death claim under Oregon law.  
21 In a post-argument memorandum of law, plaintiffs cite to two such  
22 cases, one apparently pending before the Oregon Court of Appeals,  
23 with oral argument having occurred in March 2005, and the other in  
24 which a petition for review has been filed with the Oregon Supreme  
25 Court. Pltfs' Mem. on Or. Common Law at p. 3. Plaintiffs also  
26 cite to a case of Judge King's in which Judge King declined to  
27 conclude that Oregon recognized a common law wrongful death action  
28 and further declined to certify related questions to the Oregon

1 Supreme Court. Id. Plaintiffs indicate that an appeal of Judge  
2 King's case is pending before the Ninth Circuit. Id. Plaintiffs  
3 also suggest that the issue may be raised in a pending motion to  
4 dismiss before Judge Ashmanskas. Id.

5 The problem with plaintiffs' reliance on all of these cases is  
6 that none of them is a decision from an Oregon court suggesting  
7 that its controlling law regarding common law wrongful death  
8 claims, is in doubt. Plaintiffs simply cite to cases where the  
9 argument is being made. None of the authorities cited provide a  
10 foundation for certification.

11 I decline to grant plaintiffs' request for certification.  
12 Following controlling Oregon law, I conclude there is no common law  
13 wrongful death claim in Oregon. As such, the workers' compensation  
14 exclusive remedy provision does not unconstitutionally deprive  
15 plaintiffs of a remedy for such a claim.

#### 16 C. Breach of Fiduciary Duty & Fraud Claims<sup>7</sup>

17 Under the Smothers analysis, the question is whether these  
18 claims were recognized as common law actions at the time the Oregon  
19 Constitution was adopted. Language in Smothers suggests that a  
20 specific inquiry is required. It is not enough to ask whether a  
21 claim was generally recognized as a common law action in 1857.  
22 Smothers, 332 Or. at 129, 23 P.3d at 359 (after noting that the  
23 common law recognized a cause of action for negligence in 1857, the  
24 court then went on to state that its "next, more specific inquiry  
25 is whether at common law in Oregon in 1857, an employee would have  
26

---

27 <sup>7</sup> Based on the authority cited in footnote one, I do not  
28 address the civil conspiracy allegations as a separate claim.

1 had a cause of action against an employer for failure to provide a  
2 safe workplace and failure to warn of dangerous working conditions  
3 to which the employee would be exposed.").

4 However, it is also important to note that the existence, in  
5 1857, of the precise factual scenario presented by the present  
6 claim, is not mandatory. In Lawson, the issue was whether the  
7 remedy clause protected a common law negligence action for injuries  
8 suffered in an automobile accident when automobiles did not exist  
9 in 1857. Lawson, 190 Or. App. at 97, 77 P.3d at 1163. The Oregon  
10 Court of Appeals noted that "[t]he [Oregon] Supreme Court has never  
11 stated how closely a cause of action must resemble one that existed  
12 in 1857 in order to be sheltered by Article I, section 10." Id.

13 The court was guided by Oregon Supreme Court cases construing  
14 other provisions in Oregon's Bill of Rights, including Article I,  
15 section 17's right to a jury trial. Id. In that context the  
16 Oregon Supreme Court has held that the right of jury trial was not  
17 limited strictly to those cases in existence before the adoption of  
18 the Oregon Constitution but that the right extended to "cases of  
19 like nature." Id. (internal quotation omitted).

20 Based on these and other cases under the free speech provision  
21 in Article I, section 8, the Lawson court reasoned that:

22 Article I, section 8, and Article I, section 17--like  
23 Article I, section 10--are original constitutional  
24 guarantees contained in the Oregon Bill of Rights. There  
25 is no reason to believe that the remedy clause does not,  
26 in like manner, safeguard "extensions" that remain true  
27 to its "initial principle." We conclude that that is the  
28 case here. Article I, section 10, protects claims for  
negligence that are equivalent in substance--though  
modern in form--to those that existed at common law in  
1857.

Id. at 98, 77 P.3d at 1164.

1       The basis of plaintiffs' breach of fiduciary duty and fraud  
2 claims is that defendants conspired to deprive plaintiffs of their  
3 right to bring a common law negligence claim against defendants  
4 under Smothers. More particularly, plaintiffs contend that  
5 defendants accepted Willard Sworden's workers' compensation claim  
6 without sufficient evidence of major contributing cause, thereby  
7 preventing plaintiffs from bringing a civil action in court  
8 pursuant to Smothers.

9       In terms of the fraud claim, the elements of the claim would  
10 be that defendants, knowing that there was insufficient evidence of  
11 major contributing cause (or that the evidence of major  
12 contributing cause was false), represented to plaintiffs that there  
13 was evidence of major contributing cause, plaintiffs relied on that  
14 representation to their detriment, and plaintiffs were harmed by  
15 the false representation. Oregon common law recognized a claim for  
16 fraud in 1857. See Smallwood v. Fisk, 146 Or. App. 695, 702-03,  
17 934 P.2d 557, 561 (1997) (discussing history of Oregon fraud claims  
18 and referring to recovery of damages for a civil action for fraud  
19 in 1864). Under Smothers, that general inquiry is insufficient.  
20 Obviously, the precise factual scenario presented by the fraud  
21 claim did not exist in 1857 because there was no workers'  
22 compensation system at that time and no requirement for proof of  
23 major contributing cause; there clearly was no claim for wrongly  
24 accepting a workers' compensation claim at the time of the adoption  
25 of the Oregon Constitution.

26       Following the analysis in Lawson, the inquiry is whether the  
27 fraud claim is an extension of a common law fraud claim apparent in  
28 1857 or is a claim of like nature. The analogous claim in 1857

1 would be that an employer falsely admitted its negligence in the  
2 face of a negligence claim by an employee for the employee's work-  
3 related injury or disease. I conclude that no such fraud claim  
4 existed at common law in 1857. No claim for fraud could be based  
5 on an allegedly false admission that the employer was a  
6 contributing cause of an employee's injury. The only "damage" from  
7 such an admission would have been to deprive the employee of a  
8 determination of liability by a jury. Negligence defendants have  
9 always been free to admit liability and dispute damages only. This  
10 is not a sufficient basis for a fraud claim and such a claim would  
11 not have been recognized at common law in Oregon in 1857. The same  
12 holds true for ESIS which would be viewed as the employer's agent.

13 As to the breach of fiduciary duty claim, assuming that such  
14 a claim was generally recognized at common law in 1857, but see  
15 Hanggi v. Hartford Fire Insurance Co., 132 Or. App. 601, 608, 889  
16 P.2d 365, 369 (1995) (discussing argument that breach of fiduciary  
17 duty claims are not torts, but are based upon principles of trust  
18 law developed in courts of equity), the claim in this case is that  
19 by accepting Willard Sworden's workers' compensation claim, the  
20 employer breached a duty of care owed by the employer to the  
21 employee. See Georgetown Realty, Inc. v. The Home Ins. Co., 313  
22 Or. 97, 111 n.7, 831 P.2d 7, 14 n.7 (1992) (breach of fiduciary  
23 duty claim alleges a breach of the duty of care that the law  
24 implies from the relationship).

25 As with the fraud claim, because the workers' compensation  
26 system did not exist in 1857, this claim is properly viewed as a  
27 claim of "like nature" to one alleging that an employer breached  
28 its fiduciary duty to its employee when by admitting negligence in

1 a civil action brought by the employee against the employer for a  
2 work-related injury or disease. There is no support for a  
3 conclusion that the law would have implied a fiduciary relationship  
4 between an employee and employer in the context of litigation  
5 between the two. No such claim would have been recognized at  
6 common law in 1857. The same holds true for ESIS which would be  
7 viewed as the employer's agent. Moreover, for both the fraud and  
8 breach of fiduciary duty claims, I have assumed that the plaintiff  
9 is the actual employee. Because the claims in this case are  
10 brought by the employee's estate and adult child, the existence of  
11 the claims at common law in 1857 is even more remote.

12 Because neither the fraud nor the breach of fiduciary duty  
13 claims would have been recognized at common law in 1857, the  
14 deprivation of the right to bring these claims, caused by the  
15 application of the workers' compensation exclusive remedy  
16 provision, does not violate the remedy provision of Article I,  
17 section 10.

18 Given my conclusion that Article I, section 10 does not  
19 protect these claims, I need not analyze the second question in the  
20 Smothers remedy clause analysis of whether the Oregon Legislature  
21 has provided a constitutionally adequate substitute remedy.

22 In sum, the exclusive remedy provision of the workers'  
23 compensation laws initially applies to all of the claims brought by  
24 these plaintiffs in this action. Assuming for the purposes of this  
25 motion that the acceptance of Willard Sworden's claim was somehow  
26 in error and that plaintiffs could obtain a final order of denial  
27 of the claim, the exclusive remedy provision still prevents them  
28 from bringing their tort claims in this case because in 1857, the

1 common law of Oregon did not recognize any of the causes of action  
2 plaintiffs bring here for the alleged injury. Thus, the Oregon  
3 Legislature's depriving plaintiffs of their right to bring these  
4 claims does not violate Article I, section 10 of the Oregon  
5 Constitution.

### 6 III. Issues Regarding Alcoa

7 Plaintiffs argue that even if there is immunity afforded to  
8 Reynolds by the exclusivity provision and that such immunity does  
9 not violate Article I, section 10, Alcoa is not protected by the  
10 exclusivity provision in any event. I reject plaintiffs' argument.

11 The undisputed facts are that at all times Reynolds employed  
12 Willard Sworden. Mar. 30, 2005 Declr. of Dale Perdue at ¶ 3. On  
13 May 3, 2000, several months before the plant shut down permanently,  
14 Alcoa purchased Reynolds. Id. at ¶ 4. As noted in the background  
15 section of this Opinion, the purchase was in the form of a merger  
16 between Reynolds and a wholly-owned subsidiary of Alcoa named RLM  
17 Acquisition Corporation. Id. at ¶¶ 5-7. The surviving entity of  
18 that merger is Reynolds Metals Company, a wholly-owned subsidiary  
19 of Alcoa. Id. at ¶ 8. From the time of purchase on May 3, 2000,  
20 until the Troutdale plant shut down permanently in the fall of  
21 2000, Reynolds continued to operate the plant. Id. at ¶ 9.

22 Based on this evidence, I agree with defendants that the  
23 record demonstrates that Reynolds alone employed Willard Sworden  
24 for the duration of his employment at the Troutdale plant, even  
25 after the purchase by Alcoa. Before the merger, he was employed by  
26 Reynolds and after the merger, he was employed by Reynolds the  
27 subsidiary company, still an entity in its own right.

28 Although there appears to be a split of authority, with no



1 decision from the Oregon courts regarding Oregon law, I follow the  
2 authority holding that a subsidiary's exclusive remedy protection  
3 applies to the parent corporation unless the parent corporation  
4 commits a separate act. E.g., Waste Mgmt, Inc. v. Superior Ct.,  
5 119 Cal. App. 4th 105, 113, 13 Cal. Rptr. 3d 910, 916 (2004) (where  
6 "a subsidiary corporation has satisfied its obligation to an  
7 employee by securing the payment of workers' compensation benefits,  
8 the employee cannot hold the parent corporation liable for harm  
9 suffered by the employee in the course of employment unless the  
10 parent corporation's alleged acts of negligence are separate from  
11 those of the subsidiary"); see also Day v. NLO, 811 F. Supp. 1271,  
12 1283 (S.D. Ohio 1992) (parent corporation may be liable only if it  
13 has taken an affirmative action "apart from its relationship to the  
14 subsidiary"); Aragon v. Clover Club Foods Co., 857 P.2d 250, 256  
15 (Utah Ct. App. 1993) (when a worker asserts derivative liability,  
16 exclusivity applies, otherwise a claimant could "have his cake and  
17 eat it too" by getting workers' compensation benefits and the right  
18 to sue); but see Woodling v. Garrett Corp., 813 F.2d 543, 551 (2d  
19 Cir. 1987) (noting cases where courts have declined to disregard  
20 the corporate veil to extend one corporation's workers'  
21 compensation immunity to another). Plaintiffs have no viable  
22 separate claim against Alcoa.

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CONCLUSION

Defendants' summary judgment motions (#13, #17) are granted.  
IT IS SO ORDERED.

Dated this 8th day of June, 2005.

/s/ Dennis James Hubel  
Dennis James Hubel  
United States Magistrate Judge